

11 U.S.C. §1129(a) (10)
insider

In re Alranco, Inc., Case No. 395-32652-ddsll

10/05/95

DDS

Unpublished

Confirmation of the debtor's amended plan of reorganization was denied because the debtor failed to show that at least one non-insider class of claims which is impaired under the plan has accepted the plan as required by 11 USC §1129 (a) (10). Antonini and Lava Corp. were the only impaired classes accepting the plan. Other impaired classes had rejected the plan. Antonini was insider of debtor based upon his control of Debtor; Antonini's insider status rendered Lava Corp. an insider where Antonini controlled Lava Corp. Confirmation of the plan would be inappropriate without some support from impaired creditors.

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In Re:) Bankruptcy Case No.
ALRANCO, INC.,) 395-32652-dds11
a Nevada corporation,)
Debtor.) FINDINGS DENYING CONFIRMATION

Confirmation of the debtor's amended plan of reorganization should be denied because the debtor failed to show that at least one non-insider class of claims which is impaired under the plan has accepted the plan as required by 11 U.S.C. § 1129(a)(10).

I. Background.

This case involves a 92-unit apartment complex, known as the Parkwood Court Apartments, located in Tigard, Oregon ("the property"). The United States National Bank as Trustee for the Behrens Trust ("Trust") held a mortgage on the property having an estimated balance of about \$1.4 million. The mortgage matured in December 1994. The debtor filed chapter 11 in Las Vegas, Nevada on February 28, 1995, and the Las Vegas Bankruptcy Court transferred the case to Portland,

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1 Oregon. The debtor filed a plan which proposed to pay all
2 creditors in full with interest, but which would extend its
3 obligation to pay off the Trust for one year from the
4 effective date of the plan. The parties agreed that the date
5 by which the Trust would be paid pursuant to the plan would
6 be August 8, 1996. The Trust voted against the plan and
7 objected to confirmation asserting, among other things, bad
8 faith and lack of feasibility because of inability to obtain
9 financing within a year.

10 II. The August 11, 1995 Partial Ruling

11 At the beginning of trial of the Trust's objections
12 on August 8, 1995, the court expressed concern that the
13 debtor might not be able to meet the technical requirements
14 for confirmation set forth in 11 U.S.C. § 1129(a)(10)
15 regarding the need for an affirmative vote by a non-insider
16 impaired class. Debtor at that time announced an intention
17 to rely on Mr. Antonini and the Lava Corporation ("Lava") as
18 non-insider classes which had accepted the plan and that the
19 City of Tigard would be the debtor's fallback position
20 regarding this issue. Later, the debtor admitted that the
21 City of Tigard is unimpaired and could not be used in this
22 regard.

23 After three days of trial, the court found that the
24 property in this case was worth between \$2.6 million and \$3.2
25 million and that it "should be able to support a debt of
26 approximately \$2 million." The court determined that the

1 transfer of the property from Mr. Antonini to the debtor was
2 not intended "to be in actual fraud of creditors" and that
3 Mr. Riches, the present owner of the debtor, had a very real
4 interest in the property which was "sufficient to overcome
5 the suggestions of fraud."

6 Rehabilitation of the property was far enough along
7 to be reasonably completed within 60 to 90 days and it was
8 likely that the property, which at that time was 92%
9 occupied, would be fully rented after completion of the
10 rehabilitation. The court found the plan to be confirmable
11 as feasible under 11 U.S.C. § 1129(a)(11) if the debtor
12 amended the plan to remove restrictions upon the Trust's
13 remedies upon default, provided adequate written financial
14 statements for both the debtor and Mr. Riches, removed junior
15 encumbrances which under existing commercial loan practices
16 barred the debtor from obtaining a loan sufficient to take
17 out the Trust, and showed proof of the filing of 1993 tax
18 returns and extensions for the year 1994 for both the debtor
19 and Mr. Riches.

20 The debtor, prior to and at a subsequent hearing on
21 September 12, 1995, satisfied the foregoing conditions with
22 the possible exception of Mrs. Antonini's failure to document
23 her consent to removal of the Antonini encumbrance. The
24 court, at the September 12, 1995 hearing, again reminded the
25 parties of the need for the consent of an impaired non-
26 insider class.

3 - FINDINGS DENYING CONFIRMATION

1 III. No Impaired Non-insider Class Has Accepted the Plan.

2 Mr. Antonini is an insider under
3 11 U.S.C. § 101(31)(B)(ii) and (iii) because he was an
4 officer of the debtor at the time of filing and at all
5 relevant times was a person in control of the debtor. I rely
6 upon the following evidence in the record in making this
7 finding.

8 Exhibit T, which is dated December 24, 1989,
9 appointed Mr. Antonini as debtor's president "to serve for a
10 period of one year and until [his successor is] appointed or
11 elected and shall qualify". The debtor provided no
12 documentary evidence showing that a successor or a
13 replacement had been selected prior to filing. Through their
14 testimony, neither Mr. Riches nor Mr. Antonini could recall
15 when Mr. Antonini was replaced as president of debtor. Not
16 until March 6, 1995, i.e. after the petition date, is there
17 any evidence that Mr. Riches has replaced Mr. Antonini as
18 president of the debtor. See Exhibit 136, which was
19 admitted, and which is a "List of Officers, Directors and
20 Agent of ALRANCO" dated March 6, 1995 and filed with the
21 Nevada Secretary of State.

22 The following exhibits tend to show that Mr. Antonini
23 was still debtor's president on the petition date, i.e.
24 February 28, 1995:

25 1. Exhibit 115. On January 10, 1994, Debtor's
26 Application for Authority to Transact Business - Foreign

1 Business Corporation was filed with Oregon Secretary of
2 State. Mr. Antonini signed the application as president of
3 debtor.

4 2. Exhibit 111. Mr. Antonini signed as debtor's
5 president an ALRANCO corporate resolution effective September
6 30, 1994. Mr. Riches signed this resolution as debtor's
7 secretary/treasurer.

8 3. Exhibit 130. The Statement of Financial Affairs
9 filed in this case by the debtor affirmatively states in
10 paragraph 20(b) that no officers or directors terminated
11 their relationships with debtor within one year prior to the
12 commencement of the case.

13 Because the evidence reflects that Mr. Antonini was
14 debtor's president on the petition date, Mr. Antonini is by
15 statutory definition an insider. The court need not
16 determine whether Mr. Antonini has sufficiently purged
17 himself of insider status by relinquishing his position as an
18 officer post-petition, because the court also finds that Mr.
19 Antonini is and was at all material times a "person in
20 control of the debtor."

21 The strongest evidence in the record of Mr.
22 Antonini's continuing control over the property after October
23 28, 1993, i.e. the purported date of transfer to debtor under
24 the land sale contract, is Exhibit 152 in which he agreed to
25 transfer the property only if Mr. Riches could obtain
26 financing before the Trust's mortgage matured.

1 Mr. Antonini assured his control by keeping
2 possession of the debtor's checkbook and check registers
3 during the pendency of these proceedings. He repeatedly
4 delayed providing the check registers in the face of
5 discovery requests and the directives of the court, thereby
6 controlling the progress of this case on behalf of the
7 debtor.

8 Further, Mr. Antonini testified to his "diligent
9 effort" to get an extension from the Trust to accomplish a
10 refinance, notwithstanding his insistence that it was Mr.
11 Riches' obligation to refinance the property. No evidence
12 was presented which indicated that Mr. Riches negotiated with
13 the Trust for an extension prior to the maturity date, and it
14 appears from the record that Mr. Riches only presented
15 himself to the Trust, with the unrecorded land sale contract
16 in hand, after the foreclosure against the Antoninis had
17 commenced.

18 Additionally, Mr. Antonini assumed full
19 responsibility for not recording the land sale contract to
20 debtor and thereby retained ultimate control. He explained:
21 "We did not allow Mr. Riches to record any documents,
22 however, and only did when we had a problem with the lender
23 who was threatening to take the property."

24 Finally, Ms. Owens testified that when she appeared
25 at the property to do an on-site inspection following the
26 maturity date of the obligation to the Trust, Ms. Partin, the

1 resident manager received and followed telephonic
2 instructions from Mr. Antonini in allowing Ms. Owens access
3 to some of the units on the property. Ms. Partin's
4 acquiescence to Mr. Antonini's instructions is evidence of
5 Mr. Antonini's control of the property.

6 Some people "...are insiders because they "control"
7 the debtor. The control such persons exercise need not be
8 legal or absolute." In re F & S Central Manufacturing Corp.
9 (DeRosa v. Buildex Incorporated), 53 B.R. 842 (Bankr.
10 E.D.N.Y. 1985), citing 2 Norton Bankruptcy Law & Practice
11 §32.30 (1981).

12 Lava is not an affiliate of debtor as defined by 11
13 U.S.C. § 101(2) for the reasons that neither debtor nor Mr.
14 Riches owns stock in Lava, Lava owns no stock in debtor, and
15 no entity owns 20% of the stock of both debtor and Lava.
16 However, this does not end the court's inquiry regarding the
17 insider status of Lava.

18 The testimony regarding Lava is scant: Lava is a
19 Texas corporation; Lava's only acts are "holding a couple of
20 loans;" Mr. Antonini is Lava's president, and Mr. Antonini
21 owns 46% of the shares of Lava. Based upon the evidence in
22 the record and the testimony of Mr. Antonini the court finds
23 that Mr. Antonini controls Lava. Mr. Antonini was
24 responsible for the timing and placement of the Lava lien on
25 the property. Further, when questioned about the willingness
26 of Antonini and Lava to remove their liens from the property

1 to enable refinancing, Mr. Antonini agreed on behalf of
2 himself and on behalf of Lava, without qualification. He
3 executed the release on behalf of Lava. See debtor's Exhibit
4 F. The court concludes that Mr. Antonini controls Lava.

5 The more difficult question is whether Mr. Antonini's
6 control over Lava renders Lava an insider. The court finds
7 that it does. "Use of the word 'includes' in § 101(25) now
8 §101(31) evidences Congress' expansive view of the scope of
9 the insider class, suggesting that the statutory definition
10 is not limiting and must be flexibly applied on a case-by-
11 case basis." Wilson v. Huffman, (In re Missionary Baptist
12 Foundation of America, Inc.), 712 F.2d 206,210 (5th Cir.
13 1983). Courts determine on a case-by-case basis whether an
14 entity is an insider based upon the facts. See In re
15 Anderson, 65 B.R. 482 (Bankr. D. Or. 1994), citing Miller v.
16 Schuman (In re Schuman), 81 B.R. 583, 586 (9th Cir. BAP
17 1987). Common control has been found to render an entity not
18 otherwise related to a debtor an insider of the debtor. See
19 In re Ingleside Associates, 136 B.R. 955 (Bankr. E.D. Pa.
20 1992); See also, In re Hempstead Realty Associates, 38 B.R.
21 287, 289 (Bankr. S.D.N.Y 1984). Although Lava does not
22 control the debtor, Mr. Antonini controls both Lava and the
23 debtor.

24 Because no impaired non-insider class has accepted
25 the plan denial of confirmation is appropriate. "Since
26 Chapter 11 is designed to promote consensual reorganization

1 plans, a proposal that has no support from impaired creditors
2 cannot serve its purpose." In re Windsor on the River
3 Associates, Ltd., 7 F.3d 127, 131 (8th Cir. 1993). Further,
4 "Section 1129(a)(10) was created in 1984 to protect lenders
5 from the potential inequities of the "cramdown" provisions of
6 the Bankruptcy Act." Id. "The purpose of 1129(a)(10) is to
7 provide some indicia of support by affected creditors and
8 prevent confirmation where such support is lacking." In re
9 Lettick Typographic, Inc., 103 B.R. 32, 38 (Bankr. D.
10 Connecticut 1989).

11 This case is set for a further hearing on October 13,
12 1995 at 10:30 a.m. at which time the court will consider
13 whether this case should be converted or dismissed, or other
14 order entered.

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17 DONAL D. SULLIVAN
Bankruptcy Judge

18 cc: Bradley O. Baker
19 Jennifer L. Palmquist
Paul R. Bocci, Jr.
20 U. S. Trustee